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# **MEDOIL CORP. v. CITICORP: UNCERTAINTY REQUIRES AN IN- DEPTH INQUIRY INTO FORUM- SELECTION CLAUSE ENFORCEABILITY ISSUES**

## **I. INTRODUCTION**

Forum-selection clauses<sup>1</sup> play an important role in international business transactions.<sup>2</sup> The procedure of specifying a forum and a body of governing law allows the parties to negotiate with a reasonable degree of certainty as to the costs and convenience of potential litigation.<sup>3</sup> By selecting a single forum to resolve disputes arising under the contract, forum-selection clauses can also prevent jurisdictional conflicts between the courts of nations that have personal jurisdiction over the parties.<sup>4</sup> Furthermore, such clauses allow parties to specify a particular forum that may be better suited to resolve potential disputes arising under the contract.<sup>5</sup> Finally, forum-selection clauses help to encourage international trade and bring added

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1. A forum-selection clause is a contractual provision specifying a particular forum for litigation arising under the contract. See Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 136 [hereinafter Gruson, *Forum-Selection Clauses*]. Courts and commentators sometimes refer to such clauses as "jurisdiction clauses," "forum clauses," "choice-of-forum provisions," or "consensual adjudicatory procedure." See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-15 (1972); *Arsenis v. Atlantic Tankers Ltd.*, 240 N.Y.S.2d 69, 71 (N.Y.C. Civ. Ct. 1967). Such clauses can be exclusive or nonexclusive. An exclusive clause will require that litigation arising under the contract be brought only in the designated forum. A nonexclusive clause allows litigation in the designated forum, but does not prohibit an action from being brought in another jurisdiction. See Schreiber, *Appealability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument Against Canceling Out The Bremen*, 57 FORDHAM L. REV. 463 n.3 (1988). The question of whether the parties intended the clause to be exclusive or nonexclusive is one of contract interpretation left to the court. See Gruson, *Forum-Selection Clauses*, *supra* at 133.

2. See Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements — New York's Approach*, 1982 U. ILL. L. REV. 207 (1988) [hereinafter Gruson, *Governing-Law Clauses*]; see also Gruson, *Forum-Selection Clauses*, *supra* note 1, at 133-34.

3. Erickson, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN L. REV. 1090, 1092-93 (1988) [hereinafter Erickson]; see Gruson, *Governing-Law Clauses*, *supra* note 2, at 207; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 133.

4. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KENT L.J. 1, 2 (1976) [hereinafter Gilbert].

5. See Gilbert, *supra* note 4, at 3.

stability to international business transactions, because they remove the uncertainty of litigating a dispute in an unknown jurisdiction.<sup>6</sup>

Because of their important function in international business transactions, forum-selection clauses have become very common components of international business contracts.<sup>7</sup> Increasingly, United States courts have been called upon to determine the enforceability<sup>8</sup> of such clauses.<sup>9</sup> In determining the enforceability of these clauses, courts must grapple with a host of issues related to the contractual freedom of the parties, jurisdictional principles, conflict-of-laws rules, venue choices, and forum non conveniens defenses.<sup>10</sup> Notwithstanding the numerous complex issues involved in the resolution of such litigation, courts in the United States have developed a solution to the issue of the enforceability of forum-selection clauses, and this solution has been partially guided by the policy concerns of promoting international business transactions as well as freedom of contract.<sup>11</sup> Currently, United States courts view forum-selection clauses as *prima facie* valid unless enforcement is shown to be unreasonable, unjust, or in contravention to a strong United States public policy.<sup>12</sup>

Even though the United States courts have chosen to enforce most forum-selection clauses, the courts have "created a

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6. See A. EHRENZWEIG, CONFLICT OF LAWS 149, 151-52 (1962) [hereinafter EHRENZWEIG].

7. See Gilbert, *supra* note 4, at 2; see generally Gruson, *Forum-Selection Clauses*, *supra* note 1, at 133; Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988) [hereinafter Mullenix].

8. This Comment uses the term "enforceability" rather than "validity." Some courts discuss the "validity" of such clauses. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 136 n.8. While a forum-selection clause may be enforceable in the contracting forum as a proper submission to that court's jurisdiction, it may be unenforceable in an excluded forum where the litigation was commenced in violation of the agreement. Thus, it is not helpful to refer to a single clause as valid in one jurisdiction and invalid in another.

9. See Erickson, *supra* note 3, at 1091 n.9 (1988) (An October 28, 1991, WESTLAW search of the federal courts since 1980 has revealed 265 cases concerning forum-selection clauses).

10. See Mullenix, *supra* note 7, at 297.

11. This Comment will not discuss how successful the courts have been in creating the best standard against which to judge forum-selection clauses. Instead, it will explain the test developed by those courts, how they were applied in *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456 (S.D.N.Y. 1990), and how the test can be clarified.

12. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 148; Gilbert, *supra* note 4, at 24. See also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718, 720 (2d Cir. 1982).

hodgepodge of principles and rationales to justify the doctrine" that does little to clarify the theoretical problems associated with these consensual adjudicatory practices.<sup>13</sup> Long established principles of due process and jurisdiction have been replaced by contract principles and judicial economy.<sup>14</sup> Despite the theoretical shortcomings of forum-selection clause justification, United States courts and many legal scholars still view the doctrine as a benefit to the international business community.<sup>15</sup>

Since forum-selection clauses serve the policy function of promoting international business transactions, the contracting parties must have a clear standard by which to measure proposed forum-selection clauses.<sup>16</sup> A clear standard will enable the contracting parties to determine if a proposed forum-selection clause would be enforced in a noncontractual forum in the United States, thereby enabling the parties to draft more predictable contracts. The absence of a well-defined forum-selection clause enforceability doctrine, coupled with the necessity for establishing a uniform standard for measuring forum-selection litigation, requires that United States courts make an in-depth inquiry into the issues involved in forum-selection clause enforceability, especially the policy implications of a decision.<sup>17</sup> Recently, the United States District Court for the Southern District of New York (Southern District) handed down a decision that does not include an in-depth discussion of the forum-selection clause issues. In *Medoil Corp. v. Citicorp*,<sup>18</sup> the Southern District may have overlooked strong United States public policy concerns when it enforced a forum-selection clause. Although the court may have reached the correct decision, it failed to

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13. See Mullenix, *supra* note 7, at 302. This Comment will not discuss how successful the courts have been in addressing all the theoretical issues associated with forum-selection and governing-law clause enforceability, but will explain the analysis employed by United States courts, and how it was applied in *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456.

14. Mullenix, *supra* note 7, at 303.

15. Aside from achieving certainty, stability, and encouraging trade in the international business community, such clauses are a benefit to the courts because they serve the important function of docket clearing. See generally Gruson, *Forum-Selection Clauses*, *supra* note 1; Gruson, *Governing-Law Clauses*, *supra* note 2; Gilbert, *supra* note 4.

16. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 133; Gilbert, *supra* note 4, at 3.

17. See generally Mullenix, *supra* note 7, at 352.

18. Since the claim was based on an alleged violation of the Securities Exchange Act of 1934, and occurred in Switzerland, the court should have discussed the law's extraterritorial application. See 729 F. Supp. 1456 (S.D.N.Y. 1990).

comment on the extraterritorial application of United States securities law,<sup>19</sup> and the impact of the *Mitsubishi v. Soler Chrysler-Plymouth*<sup>20</sup> case.

This Comment will discuss the current analysis employed by the United States federal courts concerning the enforceability of forum-selection clauses in international litigation and analyze the decision of the Southern District in *Medoil Corp. v. Citicorp*<sup>21</sup> in light of prior case law. Part II summarizes the recent history of forum-selection clause enforceability, paying close attention to *The Bremen v. Zapata Off-Shore Co.*,<sup>22</sup> the leading United States Supreme Court decision in forum-selection clause litigation. Part III presents a discussion of the decision of the Southern District in *Medoil Corp. v. Citicorp*,<sup>23</sup> focusing on the court's public policy analysis. Part IV analyzes that decision with respect to the extraterritorial application of United States securities law and the Supreme Court decision in *Mitsubishi v. Soler Chrysler-Plymouth*.<sup>24</sup> This Comment concludes with a recommendation that in deciding forum-selection clause enforceability issues, the United States district courts make a more probing inquiry into the interests of each forum, the likelihood of just adjudication in a given contractual forum, and the overriding policy concerns of the United States. Only in this way will the doctrine of forum-selection enforceability continue to benefit the international business community.

## II. BACKGROUND

### A. *Enforceability of Forum-Selection Clauses: The Reasonableness Test*

Forum-selection clauses have two clearly defined effects.<sup>25</sup> One effect, known as *prorogation*, is an affirmative grant or receipt of a particular jurisdiction by the parties.<sup>26</sup> The second effect, known as *derogation*, occurs when a court of competent jurisdiction refuses to entertain a suit because the parties have

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19. 15 U.S.C. § 78a-78o (1988).

20. 473 U.S. 614 (1985).

21. 729 F. Supp. 1456.

22. 407 U.S. 1 (1972).

23. 729 F. Supp. 1456.

24. 473 U.S. 614.

25. Gilbert, *supra* note 4, at 5.

26. Gilbert, *supra* note 4, at 5.

contracted to litigate in another jurisdiction.<sup>27</sup> Historically, United States courts usually did not discuss forum-selection clauses in terms of prorogation or derogation effects.<sup>28</sup> However, in the past, most federal courts willingly accepted the idea of prorogation agreements while rejecting clauses in their derogative effect.<sup>29</sup> The courts viewed prorogation agreements as a "generally accepted rule . . . that a court which is otherwise competent may exercise jurisdiction bestowed upon it by the parties' consent before or after the cause of action accrues."<sup>30</sup> Derogation agreements caused the most difficulty for the courts because they were viewed as "ousting" the court of its jurisdiction, although this view is no longer accepted.<sup>31</sup> It has been stated that the real issue in such litigation is whether courts will enforce a forum-selection clause in their derogative effect; that is, whether courts "will refuse to entertain a suit brought in violation of the clause even though they have personal jurisdiction over the defendant."<sup>32</sup> Currently, United States courts find few problems with the derogative effects of a forum-selection clause, and thus normally choose to enforce them.<sup>33</sup>

Prior to 1955 United States federal courts usually refused to enforce forum-selection clauses in their derogative effect.<sup>34</sup> Courts refused to allow the contracting parties to "oust" the jurisdiction of the court for numerous reasons. First, without explanation, courts viewed the clauses as contrary to public policy.<sup>35</sup> The public policy argument might stem from the fact that most forum-selection clauses appeared in adhesion contracts and therefore seemed to be the product of unequal bargaining

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27. See Gilbert, *supra* note 4, at 5-7; Mullenix, *supra* note 7, at 330; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 136.

28. Mullenix, *supra* note 7, at 330.

29. Gilbert, *supra* note 4, at 8; Mullenix, *supra* note 7, at 330.

30. Gilbert, *supra* note 4, at 6 (citing *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964) (prior consent)); *Adam v. Saenger*, 303 U.S. 59 (1938) (consent rendered after cause of action accrues); Mullenix, *supra* note 7, at 330-31.

31. Gilbert, *supra* note 4, at 6.

32. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964) [hereinafter Reese].

33. Mullenix, *supra* note 7, at 331.

34. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 138. See *United Fuel Gas Co. v. Columbian Fuel*, 165 F.2d 746, 749 (4th Cir. 1948) (dictum); *Mutual Reserve Fund Life Ass'n v. Cleveland Wollen Mills*, 82 F. 508, 510 (6th Cir. 1897); *The Ciamo*, 58 F. Supp. 65, 66-67 (E.D. Pa. 1944); *The Edam*, 27 F. Supp. 8, (S.D.N.Y. 1938).

35. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 139. See, e.g., *Meacham v. Jamestown, F. & C.R.R. Co.*, 211 N.Y. 346, 354, 105 N.E. 653, 656 (1914) (Cardozo, J., concurring), *overruled*, *Seigel v. Lewis*, 40 N.Y.2d 687, 358 N.E.2d 800 (1976).

power.<sup>36</sup> Second, United States courts were hesitant to force a domiciliary to litigate a dispute in a foreign forum.<sup>37</sup> This may stem from a parochial view of the competency and ability of United States courts to settle disputes involving its citizens. Third, such clauses were seen to be antithetical to the autonomy of the courts.<sup>38</sup> Courts held that contracting parties could not decrease the jurisdiction of the courts that had been established by law.<sup>39</sup> The clauses were believed to be related to the law of remedies, and therefore could not be altered by private agreements.<sup>40</sup> However, the reasoning underlying each court's decision was most likely an amalgam of the above mentioned explanations, as well as others.<sup>41</sup>

The trend of refusing to enforce forum-selection clauses began to decline in 1949 when, in a concurring opinion in *Krenger v. Pennsylvania R.R. Co.*,<sup>42</sup> Judge Learned Hand wrote that he believed forum-selection clauses were invalid only when deemed unreasonable.<sup>43</sup> Judge Hand agreed with the view of the Restatement of Contracts, which used a contractual interpretation approach that looked to the relative bargaining strength of the parties, the negotiations surrounding the contract, and the fairness of enforcing the provision.<sup>44</sup> Contemporaneous with Judge Hand's opinion were an increasing number of scholarly works that were critical of the court's refusal to enforce forum-selection clauses.<sup>45</sup>

In 1951 the Court of Appeals for the Second Circuit (Second Circuit) upheld a forum-selection clause in a bill of lading conferring jurisdiction on the Norwegian courts in *Cerro de Pasco Copper Corp. v. Knut Knutsen*.<sup>46</sup> In *Cerro de Pasco*, the court

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36. Gilbert, *supra* note 4, at 9.

37. Gilbert, *supra* note 4, at 9; see also EHRENZWEIG *supra* note 6, at 150; Reese, *supra* note 32, at 188.

38. See Erickson, *supra* note 3, at 1094; see also Carbon Black Export v. The S.S. Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959).

39. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 139.

40. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 139; see, e.g., Meacham v. Jamestown, F. & C.R.R. Co., 211 N.Y. 346, 352, 105 N.E. 653, 655 (1914) (Cardozo, J., concurring), *overruled*, Seigel v. Lewis, 40 N.Y.2d 687, 358 N.E.2d 484 (1976).

41. See Gilbert, *supra* note 4, at 9.

42. 174 F.2d 556 (2d Cir. 1949).

43. See Farquharson, *Choice of Forum Clauses — A Brief Survey of Anglo-American Law*, 8 INT'L LAWYER 83, 95 (1974) [hereinafter Farquharson].

44. RESTATEMENT OF CONTRACTS § 558 (1932).

45. See Farquharson, *supra* note 43, at 96.

46. 187 F.2d 990 (2d Cir. 1951).

found that the United States had no connection with the dispute and subsequently held that the district court was within its discretion to dismiss the suit on forum non conveniens grounds.<sup>47</sup> Further, the court determined that the forum-selection clause was not unreasonable and upheld the decision of the Norwegian courts.<sup>48</sup> In a concurring opinion Judge Clark based his decision on the validity of the forum-selection clause rather than on a forum non conveniens analysis.<sup>49</sup>

In a similar case, the Second Circuit employed a reasonableness test in upholding a forum-selection clause conferring jurisdiction on a foreign court.<sup>50</sup> *Wm. H. Muller & Co. v. Swedish American Line Ltd.* concerned a bill of lading that conferred jurisdiction on the Swedish courts over disputes arising under the contract.<sup>51</sup> In *Muller*, the plaintiff brought suit in the Southern District of New York when cargo it had shipped on the defendant's vessel was lost at sea.<sup>52</sup> The plaintiff claimed that enforcement of the forum-selection clause would be contrary to the Carriage of Goods by Sea Act (COGSA),<sup>53</sup> since COGSA declares void clauses that lessen a carrier's liability for damages incurred during shipment of goods.<sup>54</sup> In upholding the forum-selection clause, the court employed a reasonableness test, utilizing five factors in its decision: (1) ownership of the vessel; (2) nationality of the crew; (3) whether the chosen court would apply the same measure of damages as the current forum; (4) whether the chosen forum's limitation proceedings would be more restrictive; and (5) the likelihood of fair and just adjudication of the dispute.<sup>55</sup>

This new trend in forum-selection clause enforcement was short-lived. In 1967, aspects of the *Muller* decision were over-

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47. *Id.* at 991.

48. *Id.*

49. *Id.*

50. *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955); see Gilbert, *supra* note 4, at 16; Farquharson, *supra* note 43, at 96; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 142.

51. 224 F.2d at 807.

52. *Id.*

53. *Id.* 46 U.S.C. §§ 1300-15 (1970). The Carriage of Goods by Sea Act renders void any contractual provisions designed to lessen the liability of a carrier of goods over the high seas. See also Gilbert, *supra* note 4, at 16.

54. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456 (S.D.N.Y. 1990). 46 U.S.C. § 1303(8) (1970); see also Gilbert, *supra* note 4, at 16.

55. 224 F.2d at 808.



ruled in *Indussa Corp. v. S.S. Ranborg*.<sup>56</sup> In *Indussa*, the Second Circuit held that a clause similar to that in *Muller* did in fact lessen the liability of a carrier in contravention of COGSA and was therefore void as against public policy.<sup>57</sup> Although this decision did not specifically overturn the application of the reasonableness test, it brought into question the enforceability of such clauses.<sup>58</sup>

*B. The Bremen v. Zapata Off-Shore Co.*

By 1972, although a majority of United States courts still embraced the common law approach to forum-selection enforceability, utilization of the reasonableness test in enforcing forum-selection clauses had become a somewhat persuasive and increasingly popular minority position.<sup>59</sup> It was at this time that the United States Supreme Court adopted the reasonableness approach in the landmark decision of *The Bremen v. Zapata Off-Shore Co.*<sup>60</sup> Although *The Bremen* specifically addressed forum-selection clauses in admiralty cases, it is viewed as an authority for the use of the reasonableness test in all forum-selection clause litigation.<sup>61</sup>

The dispute in *The Bremen* concerned an international towage contract between a German corporation, Unterweser Reederei (Unterweser), and a United States corporation, the Zapata Off-Shore Company (Zapata).<sup>62</sup> Unterweser agreed to tow Zapata's ocean-going drilling rig *Chaparral* from Louisiana

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56. 377 F.2d 200 (2d Cir. 1967). See also Farquharson, *supra* note 43, at 97; Gilbert, *supra* note 4, at 16-17.

57. *Indussa*, 377 F.2d at 204; see also Gruson, *Forum-Selection Clauses*, *supra* note 1, at 140 n.26.

58. See Gilbert, *supra* note 4, at 17; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 140 n.26.

59. See Gilbert, *supra* note 4, at 24.

60. 407 U.S. 1 (1972) (specifically adopting a reasonableness approach to forum-selection clause enforceability in admiralty cases).

61. See generally Gruson, *Forum-Selection Clauses*, *supra* note 1, at 149 n.58 (when the Supreme Court stated that the decision in *The Bremen* should be read along with the decision in *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964), the court implied that the reasonableness test should not be limited to admiralty cases.); *The Bremen*, 407 U.S. at 10. See also *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 n.24 (6th Cir. 1972) (dictum) ("[a]lthough the Supreme Court decision came in the context of a choice between a forum in this country and one in England, the principles announced in it would seem equally applicable to domestic choice of forum questions.")

62. *The Bremen*, 407 U.S. at 2.

to location in the Adriatic Sea.<sup>63</sup> The towage contract, submitted by Unterweser, contained a forum-selection clause which required that, "any dispute arising [under the contract] must be treated before the London Court of Justice."<sup>64</sup> The contract also contained two exculpatory clauses purporting to release Unterweser from liability for damages resulting from the voyage.<sup>65</sup>

Despite the forum-selection clause Zapata then brought suit in the United States District Court for the Southern District of Florida alleging negligence and breach of contract after the *Chaparral* had been severely damaged in a storm.<sup>66</sup> Unterweser moved to dismiss the action based on the forum-selection clause and on the grounds of forum non conveniens, or in the alternative to stay the action pending submission to the High Court of Justice.<sup>67</sup> Zapata also moved to have the district court enjoin Unterweser from pursuing the action in the High Court of Justice.<sup>68</sup>

The district court denied Unterweser's motion to dismiss based on the forum-selection clause, resting its decision on the traditional common law view that such clauses were against public policy.<sup>69</sup> The court also granted Zapata's motion to enjoin Unterweser from proceeding in the action in the High Court of Justice.<sup>70</sup> A divided Court of Appeals for the Fifth Circuit (Fifth Circuit) affirmed the decision of the district court, and later adopted it on a hearing en banc, with six judges dissenting.<sup>71</sup>

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63. *Id.*

64. *Id.*

65. Zapata executives reviewed the contract and made several changes, but left both the forum-selection and exculpatory clauses unaltered. *Id.* at 3. A Zapata vice-president then executed the contract and forwarded it to Unterweser in Germany, where it was accepted as amended, and the contract became effective. *Id.*

66. Zapata then instructed the Bremen to tow the rig to the nearby port of Tampa, Florida. 407 U.S. at 3. Zapata brought suit against Unterweser *in personam*, and the Bremen *in rem*, seeking \$3.5 million in damages alleging negligence and breach of contract. 407 U.S. at 4.

67. Before the district court ruled on its motion, Unterweser brought an action before the High Court of Justice in London claiming breach of contract. Zapata made a special appearance to contest jurisdiction, but was rejected then, and also on appeal. Unterweser filed an action to limit its liability to Zapata and other potential claimants in the district court in Tampa. 407 U.S. at 4 & 5 n.4.

68. *Id.*

69. *Id.* at 6-7. The court also rejected Unterweser's forum non conveniens argument.

70. *Id.*

71. The majority of both courts based their decisions on the reasoning of *Carbon Black Export, Inc. v. The Monrossa*, 254 F.2d 297 (5th Cir. 1958), concluding that the High Court of Justice would not be a more convenient forum than the district court in Southern Florida. See *The Bremen*, 407 U.S. at 7. *Carbon Black* stood for the proposi-

Subsequently, the Supreme Court, in an eight to one decision, vacated the judgment of the Fifth Circuit, stating "that far too little weight and effect were given to the [forum-selection] clause in resolving" the controversy between Unterweser and Zapata.<sup>72</sup> The Supreme Court held the correct approach in forum-selection clause litigation to be that such clauses are prima facie valid and should be enforced unless the defending party can "clearly show that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching."<sup>73</sup> In its decision, the Court relied heavily on policy concerns such as the current expansion of the international business markets and the emerging pro-enforceability attitude in the United States legal community,<sup>74</sup> including many United States courts.<sup>75</sup> The Court also explicitly rejected the traditional "ousting" of jurisdiction view as nothing more than a vestigial legal fiction.<sup>76</sup>

In deciding the issue of reasonableness, the Court advanced several factors to be considered in forum-selection clause litigation.<sup>77</sup> First, courts should consider whether the contract was freely negotiated between parties possessing business experience.<sup>78</sup> Second, courts must examine the record for evidence of undue influence, overreaching, or fraud.<sup>79</sup> Third, the neutrality of the contractual forum should also be taken into account.<sup>80</sup> Fourth, courts should include in this analysis whether enforce-

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tion that a forum-selection clause will not be enforced unless there selected jurisdiction would provide for a more convenient forum than the state in which the suit was brought. This is basically a forum non conveniens analysis. See *Carbon Black*, 254 F.2d 297.

72. *The Bremen*, 407 U.S. at 8.

73. *Id.* at 15.

74. As evidence of this proposition Chief Justice Burger cited the following: RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 80 (1971); Reese, *supra* note 32; EHRENZWEIG, *supra* note 6, at § 41; the MODEL CHOICE OF FORUM ACT (National Conference of Commissioners on Uniform State Laws 1968).

75. *The Bremen*, 407 U.S. at 10. In footnote 11 of the Supreme Court opinion, Chief Justice Burger cited the following cases as evidence of the minority trend of forum-selection clause enforceability: *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966); *Anastasiadis v. S.S. Little John*, 346 F.2d 281 (5th Cir. 1965) (by implication); *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951).

76. *The Bremen*, 407 U.S. at 12.

77. See Gilbert, *supra* note 4, at 27.

78. *The Bremen*, 407 U.S. at 12.

79. *Id.*

80. *Id.*

ment of the clause would be seriously inconvenient for the trial of the action;<sup>81</sup> that is, would one party effectively be denied a meaningful day in court.<sup>82</sup> Finally, the Court concluded that such clauses should not be enforced if they would contravene a strong public policy.<sup>83</sup> The decision in *The Bremen* heralded the new era of the reasonableness test in enforcing forum-selection clauses.<sup>84</sup>

### C. *Expansion of the Reasonableness Test After The Bremen*

The reasonableness test was first viewed as a two-pronged test for the enforceability of forum-selection clauses.<sup>85</sup> The first prong of the test was to determine whether the clause was void or voidable under the common-law contract principles of fraud or overreaching.<sup>86</sup> The second prong examined if enforcement would be unfair, unjust, or unreasonable.<sup>87</sup> However, the factors in examining each of the prongs overlapped, and therefore a separate analysis of the factors was not useful.<sup>88</sup> Thus, the two-prong test was eventually abandoned by a majority of the courts in favor of an aggregate approach whereby courts look to all the factors of *The Bremen* test in determining the "reasonableness" of the forum-selection clause.<sup>89</sup>

Subsequent to the Supreme Court's decision in *The Bremen*, federal courts have held that the reasonableness test is not limited to admiralty cases or to cases involving an agreement to litigate in a foreign forum.<sup>90</sup> The policy motivations behind the reasonableness test have been employed in cases dealing

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81. *Id.* at 16.

82. *Id.* at 18-19; see Gilbert, *supra* note 4, at 28.

83. *The Bremen*, 407 U.S. at 15-16; see Gilbert, *supra* note 4, at 25-26.

84. See Gilbert, *supra* note 4, at 29; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 147-49.

85. See Mullenix, *supra* note 7, at 356-57; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 163.

86. See Mullenix, *supra* note 7, at 357; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 163.

87. See Mullenix, *supra* note 7, at 357; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 163.

88. See Mullenix, *supra* note 7, at 357; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 164.

89. See Mullenix, *supra* note 7, at 357. For cases supporting this proposition, see Mullenix, *supra* note 7, at 293 n.3.

90. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 149. See *Crown Beverage Co., Inc. v. Cervceria Moctezuma S.A.*, 663 F.2d 886, 888 (9th Cir. 1981); *City of New York v. Pullman, Inc.*, 477 F. Supp. 438, 441 n.10 (S.D.N.Y. 1979); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 363 (S.D.N.Y. 1975).

with interstate agreements, arbitration agreements, and governing-law clauses.<sup>91</sup> Although *The Bremen* enunciated only three areas where a forum-selection clause may be held unenforceable, courts have broadened the test to include other conditions under which a party seeking to maintain an action in contravention of a forum-selection clause may support its claim.<sup>92</sup> These defenses can be divided into the following categories: (1) litigation in the contractual forum will present substantial inconvenience to the party; (2) the plaintiff will be denied an effective remedy; (3) the forum-selection clause is unconscionable; (4) there are statutory restrictions on the forum-selection clause; or (5) enforcement would contravene a strong public policy.<sup>93</sup> Even though these defenses can be divided into separate groups, the elements of proof are often interrelated, and a plaintiff may attempt to prove more than one defense.<sup>94</sup> And although courts will discuss the reasons for refusing to enforce such clauses in different ways, the rationales generally fits into one of the above mentioned categories.<sup>95</sup>

When parties bring an action in violation of a forum-selection clause claiming that litigating the dispute in the contractual forum will be gravely inconvenient, they will have a difficult time convincing the court of such a proposition.<sup>96</sup> Since there is a presumption that consideration was given in choosing the contractual forum,<sup>97</sup> courts believe that the parties should get what they bargained for unless there is a showing that a trial in the contractual forum will be gravely inconvenient.<sup>98</sup> Due to this

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91. See Gilbert, *supra* note 4, at 30-35; Mullenix, *supra* note 7, at 315-21; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 149-50.

92. See Gilbert, *supra* note 4, at 32.

93. See Gilbert, *supra* note 4, at 32-66; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 164-85.

94. See *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988); *Bense v. Interstate Battery Sys.*, 638 F.2d 719-22 (2d Cir. 1982); *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1458-61 (S.D.N.Y. 1990); *Dukane Fabrics Int'l, Inc. v. Hreljin, M.V.*, 600 F. Supp. 202 (S.D.N.Y. 1985).

95. See Gilbert, *supra* note 4, at 32-66; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 163-85; see also Mullenix, *supra* note 7, at 358 (discussing the decision of *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708 (D.R.I. 1983) which attempted to list the factors of *The Bremen* test that had been discussed by the federal courts).

96. See generally Gilbert, *supra* note 4, at 32 (there is a presumption "that consideration was received at the time of contracting for the alleged inconvenience," and the court will not entertain the suit unless it is otherwise unfair.) See also Gruson, *Forum-Selection Clauses*, *supra* note 1, at 182.

97. See Gilbert, *supra* note 4, at 32.

98. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972).

presumption, the defense of inconvenience has become substantially more difficult to prove than it was under prior case law, which analyzed the claim under traditional forum non conveniens principles.<sup>99</sup>

A second defense to the enforcement of a forum-selection clause is that it would deprive the plaintiff of an effective remedy.<sup>100</sup> In analyzing such a claim, courts carefully evaluate the chosen forum to see if it would be a fair forum for both parties.<sup>101</sup> The Court in *The Bremen* stressed that the contractual forum was neutral as well as experienced in admiralty litigation, and consequently found that it would be a fair forum to litigate the claim.<sup>102</sup> The requirement of neutrality of the chosen forum "will be met if the courts of the selected country are impartial, independent, free from prejudice against foreigners, and not subject to influence by one of the parties or the local government."<sup>103</sup> Other factors courts will examine are the substantive law to be applied by the contractual forum, the measure of damages allowed by statute or judicial decision, whether the action would be unduly restricted, and the general potential for just adjudication.<sup>104</sup>

A third defense to the enforcement of a forum-selection clause is that it would be unconscionable.<sup>105</sup> In deciding on a claim of unconscionability, courts consider such factors as fraud, duress, misrepresentation, the bargaining relationship between the parties, and other unconscionability factors used in contract law.<sup>106</sup> The issue of unconscionability of the clause will be addressed by courts with respect to the forum-selection clause itself, not the entire contract.<sup>107</sup> For example, the Supreme Court

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99. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 183. For a discussion of cases decided under the inconvenience rationale, see Gruson, *Forum-Selection Clauses*, *supra* note 1, at 179-82 & 179-82 n.200-14.

100. Gilbert, *supra* note 4, at 34; see Gruson, *Forum-Selection Clauses*, *supra* note 1, at 167.

101. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 167.

102. *The Bremen*, 407 U.S. at 12.

103. Gruson, *Forum-Selection Clauses*, *supra* note 1, at 169.

104. See Gilbert, *supra* note 4, at 38. For a discussion of cases dealing with the denial of an effective remedy, see Gruson, *Forum-Selection Clauses*, *supra* note 1, at 167-69 & 167-69 n.142-53; Gilbert, *supra* note 4, at 34-35 & 34-35 n.189-97.

105. Gilbert, *supra* note 4, at 38. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 170-85.

106. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 165-67; Gilbert, *supra* note 4, at 36.

107. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 165.

in *Scherk v. Alberto-Culver Co.*,<sup>108</sup> referring to the fraud exception in *The Bremen*, stated that:

This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that [a] . . . forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.<sup>109</sup>

Therefore, if the contract itself was bargained for in good faith, but the forum-selection clause was included as a result of fraud, duress, or any other unconscionable means, courts will refuse to enforce that clause and will entertain the suit.<sup>110</sup>

A fourth possibility for supporting an action brought in violation of a forum-selection clause is when enforcement would violate a specific statute of the excluded forum.<sup>111</sup> For example, The Federal Employers' Liability Act (FELA),<sup>112</sup> provides that an action may be brought under the act in any of three fora: federal district courts or state courts in the district of the defendant's residence; the district in which the cause arose; or the district in which the defendant was doing business at the time of the commencement of the action.<sup>113</sup> An agreement between an employer and employee that limits the employee's right to bring suit in any eligible forum under FELA would be held unenforceable, and the court in which the suit was brought would be forced to entertain the action.<sup>114</sup> This rationale is closely related to the public policy exception discussed below, and the courts often refer to them together.

Finally, the most important aspect of *The Bremen* was the Supreme Court's recognition of the public policy concerns of the excluded forum.<sup>115</sup> The Supreme Court stated that a contractual

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108. 417 U.S. 506 (1974). Cf. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1976) (holding the opposite for an arbitration clause).

109. *Scherk*, 417 U.S. at 519 n.14 (emphasis in original).

110. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 165.

111. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 173-74.

112. 45 U.S.C. §§ 51-60 (1957) The Federal Employers' Liability Act was enacted to protect workers in interstate activities against certain job related injuries by making the employer liable.

113. *Id.*

114. For a full discussion, see Gruson, *Forum-Selection Clauses*, *supra* note 1, at 174.

115. See generally Gilbert, *supra* note 4, at 43-66 (the extended discussion of the public policy exception is evidence of its importance relative to the other aspects of *The*

forum-selection clause would be unenforceable if enforcement would contravene a strong public policy of the excluded forum.<sup>116</sup> The court recognized that many forum-selection clauses are coupled with a choice-of-law provision specifying that any litigation under the contract will be decided under the laws of the chosen forum.<sup>117</sup> Furthermore, even if there is no such provision, the selected forum will often use its own conflict-of-laws rules and decide to resolve the dispute under its laws anyway.<sup>118</sup> Deciding an action using a materially different law from the excluded forum would violate the interests of that forum.<sup>119</sup>

For a party to be successful in claiming the public policy exception to enforceability, it must prove that the contractual forum's substantive or procedural law is in violation of a strong public policy of the excluded forum, whether statutory or judicial.<sup>120</sup> In order to prove a violation of a strong public policy, the party claiming the exception must first be able to show that the transaction giving rise to the dispute bears a relation to the excluded forum.<sup>121</sup> For example, if two non-New York parties agree to resolve all disputes arising under their contract in the courts of Italy, and the transaction giving rise to the dispute occurred in New York, the New York courts will examine Italian law for a violation of a strong New York public policy.<sup>122</sup> Then, if Italian law does so contravene New York public policy, the New York courts would have a reason to entertain an action brought in violation of the forum-selection clause.<sup>123</sup>

In analyzing the relation of the transaction to the excluded forum and the public policy exception generally, courts will take into account the following factors: (1) the domicile, nationality, residence, and principle place of business of the party bringing suit; (2) the domicile, nationality, residence, and principle place

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*Bremen* reasonableness test).

116. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

117. *The Bremen*, 407 U.S. 1; see Gilbert, *supra* note 4, at 43.

118. See Gilbert, *supra* note 4, at 43; Gruson, *Forum-Selection Clauses*, *supra* note 1, at 170 n.156.

119. See Gilbert, *supra* note 4, at 39.

120. 407 U.S. at 15 ("[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.")

121. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 171.

122. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 171. However, the courts have not discussed how significant the relationship has to be between the transaction and the excluded forum for the court to apply the public policy exception. *Id.*

123. See Gruson, *Forum-Selection Clauses*, *supra* note 1, at 171.



of business of the party defending the action; (3) the location of the transactions involved in the contract, including the place of negotiation, signing, and performance; (4) the location of the alleged breach of contract, or where the dispute arose; (5) the governmental interests of the chosen forum; and (6) the governmental interests of the excluded forum.<sup>124</sup> Although the impetus behind the forum-selection clause enforceability doctrine is in part the policy concerns of the United States, federal courts very often fail to adequately address these issues and thus fail to further refine the doctrine.

### III. *MEDOIL CORP. v. CITICORP*

#### A. *Facts*

On March 5, 1986, Medoil Corporation (Meditoil), a Liberian shipping company with its sole place of business in Connecticut,<sup>125</sup> opened an account with Citicorp Investment Bank Switzerland (CIBS), a Swiss corporation owned and controlled by Citicorp, a multinational financial institution.<sup>126</sup> The account was negotiated and opened in Zurich, Switzerland by Mr. Evangelos Karvounis, the President of Medoil, and one of the two owners of Medoil.<sup>127</sup> The business relationship between Medoil and CIBS was covered by the following agreements: (1) an account agreement; (2) an agreement governing fiduciary placements under which CIBS was authorized to make placements at Medoil's direction using funds from the account; (3) a margin agreement under which CIBS would extend a line of credit to Medoil; and (4) a declaration of pledge, whereby Medoil pledged \$500,000 to CIBS.<sup>128</sup> The account agreement offered several investments and services for customers to select from.<sup>129</sup> One of the services offered was "Safekeeping Accounts and Securities Transactions," which authorized CIBS to take

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124. See Gilbert, *supra* note 4, at 45.

125. Medoil Corporation (Meditoil) is a shipping company that conducts business with West African oil producers. It is incorporated under the laws of Liberia, and has a registered office in Monrovia. The company is owned by Medoil (USA) which has its sole place of business in Greenwich, Connecticut. The only shareholders of Medoil (USA) are Mr. Evangelos Karvounis and his wife Theodora. See *Meditoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1457-58 (S.D.N.Y. 1990).

126. *Id.*

127. *Id.*

128. See *Memorandum of Law of Defendant Citicorp in Support of Its Motion to Dismiss the Complaint*, at 5 [hereinafter *Defendant's Memorandum*].

129. *Meditoil*, 729 F. Supp. at 1458.

custody of the securities and make transactions on the account.<sup>130</sup> Mr. Karvounis did not select this service for Medoil's account.<sup>131</sup>

Subsequently, a dispute arose between Medoil and CIBS over the alleged fraudulent sale of securities. The alleged fraudulent transactions concerned the purchases of stock in Clark Copy International Corporation (Clark).<sup>132</sup> Clark was offering approximately five million shares of common stock at \$3.00 per share.<sup>133</sup> Since the shares were being offered without registration under the Securities Exchange Act of 1933, they were required to be sold to non-United States residents or citizens.<sup>134</sup> Medoil contended that financial information and the Offering Memorandum were concealed from it because the information contained in these documents was "extremely negative and . . . totally inconsistent" with the information given by CIBS' personnel.<sup>135</sup> The December 2, 1986, Offering Memorandum that was concealed from Medoil contained the following statement in bold uppercase letters: "These securities involve a high degree of risk . . . Investors must be persons who are neither United States of America residents nor . . . citizens, whether residing in the U.S.A. or abroad."<sup>136</sup> Although these transactions were alleged to be fraudulent, they were authorized by Mr. Karvounis, and Medoil subsequently purchased approximately 270,000 shares of stock in Clark.<sup>137</sup>

A situation concerning alleged fraudulent securities transactions is governed by the Securities Exchange Act of 1934 (Exchange Act).<sup>138</sup> In July of 1989 Medoil Corporation filed suit against Citicorp in the Southern District of New York, seeking compensatory and punitive damages under the Exchange Act,<sup>139</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO

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130. *Id.*

131. *Id.*

132. See *Memorandum of Law in Opposition to Defendant's Motion to Dismiss*, at 13 [hereinafter *Plaintiff's Memorandum*].

133. *Plaintiff's Memorandum*, *supra* note 132.

134. See *Plaintiff's Exhibits 1 Through 23*, exhibit 7, at ii-1 [hereinafter *Plaintiff's Exhibits*].

135. *Plaintiff's Memorandum*, *supra* note 132, at 14.

136. *Plaintiff's Exhibits*, *supra* note 134, at exhibit 10.

137. See *Reply Memorandum of Law of Defendant Citicorp in Support of its Motion to Dismiss the Complaint*, exhibit 7, at 1.

138. See 15 U.S.C. §§ 78a-78o (1988).

139. 15 U.S.C. §§ 78a-78o (1988).

Act),<sup>140</sup> as well as other pendent state claims.<sup>141</sup> The complaint alleged that the funds Medoil had deposited in its account with Citicorp were used to make unauthorized stock transactions and that Medoil purchased shares of stock in Clark while relying on the false statements and misleading omissions of CIBS employees.<sup>142</sup> Pursuant to the Federal Rules of Civil Procedure,<sup>143</sup> Citicorp moved to dismiss the complaint based on a forum-selection clause it had with Medoil that provided:

All relations between the Bank and the Account Holder(s) are governed by Swiss law. Place of performance, place of prosecution for debts and exclusive venue for all legal actions are the location of the Bank's office appearing on this Agreement regardless of the Account Holder(s)'s residence or domicile. The Bank, however, may bring action against the Account Holder(s) before the courts of any other competent authority at the place of residence of the Account Holder(s) or elsewhere, in which case Swiss law will also govern and be applied.<sup>144</sup>

### B. *The Court's Decision*

In applying the reasonableness test of *The Bremen*, the district court found that enforcement of the forum-selection clause in the account agreement would not be unreasonable, gravely inconvenient, or against public policy, and therefore dismissed Medoil's complaint.<sup>145</sup> First, the court reasoned that although Medoil did not initial the "Safekeeping" provision on the account agreement authorizing CIBS to make securities transactions on its account, the action arose out of the relationship created when the parties signed the forms containing the forum-selection clause.<sup>146</sup> Medoil used the account to make several

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140. 18 U.S.C. §§ 1961-68 (1988).

141. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1458 (S.D.N.Y. 1990).

142. *Id.*

143. Citicorp moved to dismiss under rules 12(b)(3), for improper venue, and 12(b)(6), for failure to state a claim for which relief can be granted. *See* FED. R. CIV. P. 12 (b)(3) & (b)(6). A motion to dismiss based on a forum-selection clause is considered a motion to dismiss for lack of proper venue. *Medoil*, 729 F. Supp. at 1457 n.1.

144. *Id.* at 1457. The Margin and Fiduciary Agreements, and the Declaration of Pledge contained the following clause: "The Applicable law and jurisdiction will be governed by the Account Agreement, which is known to and has been accepted by the Account Holder(s) as governing the Account Holder(s)'s business relationship with the Bank." *Id.* at 1457-58.

145. *Id.* at 1459-61.

146. *Id.* at 1458.

transactions within two weeks after it was opened and even authorized some of the alleged fraudulent transactions.<sup>147</sup> Therefore, the court held that the forum-selection clause was applicable to the dispute.<sup>148</sup>

Second, the court found that enforcement of the clause would not be unreasonable even though there were no negotiations, and even though the clause limited only Medoil's choice of forum.<sup>149</sup> Relying on another Second Circuit case, the court concluded that "mere absence of negotiation over the terms of a contract does not render a forum-selection clause unenforceable."<sup>150</sup> Thus, the court rejected Medoil's argument that forum-selection clauses limiting only one party's choice of forum are unreasonable.<sup>151</sup>

In addressing the issue of inconvenience, the court stated that enforcement of the clause would not be unreasonable.<sup>152</sup> Satisfying the burden of proving inconvenience requires a showing that litigation in the contractual forum would be so gravely inconvenient that the plaintiff would essentially be deprived of its day in court.<sup>153</sup> The court stated that Swiss courts are a fair forum for resolution of disputes, and given Mr. Karvounis' trips to Switzerland to negotiate the account, the contractual forum was not gravely inconvenient.<sup>154</sup>

Finally, the court decided that enforcement of the clause would not contravene a strong public policy of the forum.<sup>155</sup> The court stated that the public policy of enforcing the antifraud provisions of the Exchange Act would not be offended if the clause was enforced, basing its opinion on the interests of the contractual forum and of the Southern District.<sup>156</sup> In reaching this decision, the court looked to the residence of the respective litigants and the location of the negotiations and transactions, and decided that the Southern District did not have a meaning-

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147. *Id.*

148. *Id.*

149. *Id.* at 1458-59.

150. *Id.* at 1458 (citing *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 659 (2d Cir. 1988)).

151. *Id.* at 1459-60.

152. *Id.* at 1460.

153. *Id.* (citing *Schertenleib v. Traum*, 589 F.2d 1156, 1164-66 (2d Cir. 1978) (Switzerland provides alternative forum under the *forum non conveniens* doctrine)).

154. *Id.*

155. *Id.*

156. *Id.* (citing *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984) as an example).

ful connection to the suit.<sup>157</sup> The court reasoned that since Switzerland is a center of international banking and financial services and "the foreign elements of the transaction [were] sufficiently meaningful to require enforcement of the forum-selection clause, it has a substantial interest in resolving the dispute."<sup>158</sup>

### C. Discussion

As the district court held, Medoil must carry the burden of proof in demonstrating that the forum-selection clause should not be enforced as such clauses are prima facie valid and should be enforced unless shown to be unreasonable under the circumstances.<sup>159</sup> Medoil's arguments supporting its claim of "unreasonableness" did not have enough strength to support the heavy burden to which it must be held.<sup>160</sup> In analyzing the decision of *Medoil Corp. v. Citicorp*, it is first essential to discuss the plaintiff's claims of unequal bargaining power and the nonmutuality of the forum-selection clause. Second, the public policy and day in court arguments must be evaluated.

#### 1. Forum-Selection Clause as Unreasonable

Relying in part on a Second Circuit decision, Judge Stanton wrote that Medoil was "apparently experienced in international transactions" and freely chose to enter into an agreement limiting its choice of forum for any disputes that might arise under the contract.<sup>161</sup> In deciding the issue of the alleged unequal bargaining position of Medoil and CIBS, the court correctly concluded that the parties were on an equal level.<sup>162</sup> The court placed a great deal of emphasis on the fact that Medoil was in the business of international oil shipping.<sup>163</sup> Indeed, Medoil conducted business in at least six West African countries, and its president, Mr. Karvounis, had a personal business relationship

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157. *Id.*

158. *Id.*; see generally *Defendant's Memorandum*, *supra* note 128, at 9-11, 16-17.

159. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1459 (S.D.N.Y. 1990).

160. *Id.* at 1459-60.

161. *Id.* at 1459 (citing *Bense v. Interstate Battery Sys.*, 683 F.2d 718, 722 (2d Cir. 1982) (forum-selection clause bound plaintiff because it "was part of the bargain into which he freely entered.")).

162. See *id.* at 1459.

163. *Id.*

with Citicorp for over thirteen years.<sup>164</sup> Also, Mr. Karvounis traveled to Switzerland to open the account, which is evidence that he initiated the business relationship.<sup>165</sup> Furthermore, although Medoil could have opened an account in the United States, it chose not to.<sup>166</sup> The aforementioned factors are evidence that Medoil was an experienced business entity. Therefore, Medoil was unable to prove that Citicorp was in such a superior bargaining position that the forum-selection clause was unreasonable and thus unenforceable.

Similarly, the court correctly rejected Medoil's arguments that the nonmutuality of the forum-selection clause and the absence of any negotiation required that the clause be held unenforceable.<sup>167</sup> Medoil's argument, that the clause limited only its choice of forum and should therefore be found unreasonable, is totally misplaced. Medoil based its argument on an extension of a New York rule invalidating nonmutual arbitration agreements,<sup>168</sup> relying on the analogy of arbitration agreements to forum-selection clauses.<sup>169</sup> However, by the time of Medoil's complaint, this rule had been overturned by the New York Court of Appeals.<sup>170</sup> Moreover, even when in effect, this rule had not been extended to cover nonmutual forum-selection clauses.<sup>171</sup>

Medoil's argument urging a finding of unenforceability due to lack of negotiations is also without merit. Medoil based its argument on a reading of the Supreme Court's decision in *The Bremen* that is misplaced. More specifically, Medoil argued that *The Bremen* requires enforceability only when the clause is

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164. See *Plaintiff's Memorandum*, *supra* note 132, at 10; *Defendant's Memorandum*, *supra* note 128, at 14-15.

165. See *Medoil Corp. v. Citicorp*, 729 F. Supp. at 1459 (the context within which this is discussed is evidence that the court thought it not to be a case of solicitation of an unsophisticated individual by a large corporation.); see also *Defendant's Memorandum*, *supra* note 128, at 14.

166. *Medoil*, 729 F. Supp. at 1459.

167. *Id.* at 1459-60.

168. The New York rule declared void any nonmutual arbitration agreements; agreements that required only one party to bring any claims to arbitration rather than to sue. See *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659-60 (2d Cir. 1988); *Cored Panels, Inc. v. Meinhard Commercial Corp.*, 420 N.Y.S.2d 731 (App. Div. 1979); *Firedoor Corp. of America, Inc. v. R.K. & A. Jones, Inc.*, 366 N.Y.S.2d 443 (App. Div. 1975).

169. See *Scherk v. Alberto-Culver*, 417 U.S. 506, 519 (1974) (held an agreement to arbitrate before a special tribunal is, in effect, a kind of forum-selection clause).

170. See *Sablosky v. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513, 535 N.E.2d 643 (N.Y. 1989) (overruled the New York rule against nonmutual clauses).

171. See *Karl Koch Erecting*, 838 F.2d at 659-60.

"freely negotiated [and] bargained for [during] an arm's-length negotiation by experienced and sophisticated businessmen."<sup>172</sup> Medoil claimed that "the [a]ccount [a]greement was a boiler-plate contract of adhesion."<sup>173</sup> Although such a reading is technically correct, courts in the Southern District have "consistently found that is not unreasonable to enforce a forum provision embodied within a standard printed [contract]."<sup>174</sup> Accepting Medoil's argument without more specific proof of overreaching would be to hold void all forum-selection clauses in standard printed contracts.<sup>175</sup> The mere fact that the forum-selection clause was not specifically negotiated for is not of great concern; instead, the focus should be on whether the entire contract was formed by experienced businessmen.

## 2. Medoil's Day in Court And Public Policy Arguments

A joint discussion of Medoil's public policy claims and its claims of being denied its day in court is logical since the latter is often discussed tangentially as an "oblique [way] of saying that the law which the chosen forum would probably apply would oppose a strong public policy of the nonchosen forum."<sup>176</sup> Medoil claimed that by forcing it to litigate this dispute in Switzerland, the court denied it the right to pursue its claim under the antifraud provision of the Exchange Act.<sup>177</sup> Although Medoil conceded that recovery under this theory is possible in the Swiss courts, it argued that it is highly unlikely that it will be able to recover, and argued that even if it did recover, such recovery will be drastically less than it would be in the United States.<sup>178</sup> Medoil based its argument in part on the requirement in Swiss law of proof of a level of fraud approaching criminal conduct to

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172. *Plaintiff's Memorandum*, *supra* note 132, at 22; *see also* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-14 (1972).

173. *Plaintiff's Memorandum*, *supra* note 132, at 22.

174. *Dukane Fabrics Int'l v. Hreljin, M.V.*, 600 F. Supp. 202, 203 (S.D.N.Y. 1985) (citing *Galaxy Export Corp. v. M/V Hektor*, 1983 A.M.C. 2637, 2639 (S.D.N.Y. 1983)).

175. *See Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrows, S.A.*, 493 F. Supp. 626, 630 n.14 (S.D.N.Y. 1980).

176. Gilbert, *supra* note 4, at 43.

177. *See Plaintiff's Memorandum*, *supra* note 132, at 27.

178. *See Plaintiff's Memorandum*, *supra* note 132, at 27. Medoil based its argument on a letter written by Mr. Francis Hogskin, Esq., a Swiss attorney who "consider[s] it most unlikely that [Meditoil] would be able to prove either an illegal action or breach of contract by the bank. Even if this were possible, the claim to damages would be reduced drastically because the fault would seem as largely the customer's own." *Plaintiff's Exhibits*, *supra* note 134, exhibit 21, at 3.

entitle a plaintiff to recovery.<sup>179</sup>

Forum-selection clauses are not unreasonable simply because they require a plaintiff to bring an action in a forum whose law or procedure is less favorable to it than the United States.<sup>180</sup> However, Medoil augmented its day in court argument with the strong public policy of the United States in protecting private investors in the securities markets.<sup>181</sup> Citing the Fifth Circuit decision in *Scherk v. Alberto-Culver*,<sup>182</sup> Medoil argued that: "Congress conceived that securities are 'intricate merchandise,' and that the public interest demanded legislation which would recognize the gross inequality of bargaining power between the professionals in the securities business and the average investor."<sup>183</sup>

Medoil proposed another policy argument in support of maintaining the action in the Southern District. Medoil argued that allowing a multinational corporation like Citicorp to evade the United States securities laws through its corporate structure and a forum-selection clause, thereby allowing a foreign office to "solicit and consummate in the United States the sale of an American security [to] an American Citizen," would be against the policy of the Exchange Act.<sup>184</sup> In essence, according to Medoil, this would turn the United States securities market into a "Barbary Coast" for international securities pirates by allowing foreign securities brokers to fraudulently promote securities and then claim solace within the forum-selection clause in the contract.<sup>185</sup>

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179. See *Plaintiff's Memorandum*, *supra* note 132, at 27; *Plaintiff's Exhibits*, *supra* note 134, exhibit 21, at 2.

180. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990) (citing *Karlberg European Tanspa, Inc. v. JK-Joseph Hratz Vertriebsgesellschaft mbH*, 618 F. Supp. 344, 348-49 (N.D. Ill. 1985); *Dukane Fabrics Int'l*, 600 F. Supp. 202, 204 (S.D.N.Y. 1985)).

181. See *Plaintiff's Memorandum*, *supra* note 132, at 32. In support of its claim, Medoil cites: 78 CONG. REC. 1934 (remarks of Sen. Fletcher); 4 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES ACT OF 1934, 2270 (J. Ellenberger & E. Maher Eds. 1973); *Williams v. E.F. Hutton & Co.*, 753 F.2d 117, 120 (D.C. Cir. 1985) (Congress recognized inequality of bargaining power between buyers and sellers); *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1943) ("essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do.").

182. *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974).

183. See *Plaintiff's Memorandum*, *supra* note 132, at 32.

184. See *Plaintiff's Memorandum*, *supra* note 132, at 32.

185. See *Plaintiff's Memorandum*, *supra* note 132, at 32 (citing *SEC v. Kassar*, 548 F.2d at 116 (3d Cir. 1977)).



The district court separately answered each of Medoil's claims.<sup>186</sup> With regard to the day-in-court argument, the court stated that Medoil must show that Switzerland is so difficult a forum that it will "essentially be deprived of its day in court,"<sup>187</sup> and not that the laws of the forum are less favorable than in the United States.<sup>188</sup> The court then went on to cite numerous decisions where other courts held that the Swiss courts were a fair and reasonable forum for the resolution of disputes.<sup>189</sup> Furthermore, the court pointed out that Mr. Karvounis had made numerous trips to Switzerland to set up the account and that another trip to litigate the dispute would not be "extraordinarily inconvenient."<sup>190</sup>

With respect to Medoil's public policy argument, the court answered by citing *AVC Nederland B.V. v. Atrium Inv. Partnership*,<sup>191</sup> a Second Circuit case that enforced a forum-selection clause in an action under section 10(b) of the Exchange Act, and *Fustok v. Banque Populaire Suisse*,<sup>192</sup> a Southern District case that applied a forum non conveniens analysis to an action under the Commodity Exchange Act. In *AVC Nederland*, the Second Circuit found the foreign elements of the transactions "sufficiently meaningful to require enforcement of the forum-selection clause," even though it was highly unlikely that the Swiss courts would apply the Exchange Act.<sup>193</sup> Similarly, the *Medoil* court found that the ties to Switzerland were sufficient to dismiss the action based on the forum-selection clause.<sup>194</sup>

#### IV. ANALYSIS

The district court's discussion of Medoil's claims of unequal

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186. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990).

187. *Id.* See also *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 126 (S.D.N.Y. 1986), *aff'd* 812 F.2d 712 (2d Cir. 1987); *Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrows, S.A.*, 493 F. Supp. 626, 630 (S.D.N.Y. 1990).

188. *Medoil*, 729 F. Supp. at 1460.

189. *Id.* (citing *Schertenleib v. Traum*, 589 F.2d 1156, 1164-66 (2d Cir. 1978)); *Ras-kin S.A. v. Datasonic Corp.*, No. 86-C7596, 1987 WL 8180 (N.D. Ill. 1987). Both cases hold that the Swiss courts are a fair forum for the resolution of disputes concerning United States citizens.

190. *Id.*

191. *Id.* (citing *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 149 (2d Cir. 1984)).

192. *Id.* at 1460-61 (citing *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 513-14 (S.D.N.Y. 1982)).

193. *Id.* at 1460.

194. *Id.*

bargaining power and nonmutuality of the forum-selection clause is directly on point, and the court was correct in dismissing the suit.<sup>195</sup> However, the district court's opinion is void of an in-depth discussion of the United States policy concerns underlying the forum-selection clause dismissal.<sup>196</sup> Since such discussions are necessary to clarify the remaining uncertainty involving the doctrine of forum-selection clause enforceability, *Medoil* adds little to the progeny of *The Bremen v. Zapata Off-Shore Co.*<sup>197</sup>

At least two possibilities exist in discussing the policy behind the doctrine of forum-selection clause enforceability. One possible discussion involves an interpretation of the Supreme Court decision in *Mitsubishi v. Soler Chrysler-Plymouth*,<sup>198</sup> and another involves an analysis of the extraterritorial application of the SEC Act.<sup>199</sup>

#### A. *Mitsubishi v. Soler Chrysler-Plymouth*

Reliance on *AVC Nederland B.V.* and *Fustok* in responding to *Medoil*'s public policy argument is not soundly based. Not only does *Fustok* concern claims arising under a different substantive law of the United States,<sup>200</sup> but both cases are factually distinct from *Medoil*. Furthermore, persuasive dictum to the contrary exists in the Supreme Court decision of *Mitsubishi Motors v. Soler Chrysler-Plymouth*.<sup>201</sup> In *Mitsubishi*, Justice Blackmun wrote: "[In] the event [that] the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."<sup>202</sup> Although this discussion appears in a footnote, its language is straightforward and persuasive, and it is clear that the Court recognized the public policy concerns of the United States under the Sherman Antitrust Act.<sup>203</sup> Furthermore, the decision was five to three,<sup>204</sup> Jus-

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195. *Id.* at 1461.

196. *See id.* at 1459-61.

197. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

198. *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

199. 15 U.S.C. §§ 78a-78o; 18 U.S.C. §§ 1961-68.

200. Compare 15 U.S.C. § 10(b) (1988) and 7 U.S.C. § 1 (1936) with 15 U.S.C. 78a-78o (1988).

201. 473 U.S. 614 (1985).

202. *Id.* at 637 n.19.

203. 15 U.S.C. §§ 1-7 (1890).

tices Stevens, Brennan, and Marshall voted to hold the forum-selection clause unenforceable as against public policy.<sup>205</sup> The language and concern of the Supreme Court can be extended to cover claims under the Exchange Act, especially in light of the current recessionary atmosphere and the Court's interest in protecting United States securities purchasers. Since the forum-selection clause in *Medoil* is coupled with a choice-of-law provision, it is highly likely that the two would work in tandem as a prospective waiver of Medoil's right to pursue a claim under the Exchange Act.<sup>206</sup> Had this case been decided by the Supreme Court, a different outcome might have occurred.

On the other hand, the Southern District may have decided the issue of enforceability correctly. Medoil, a Liberian shipping company, has its sole place of business in Greenwich, Connecticut, and its only shareholders are two United States citizens.<sup>207</sup> Since a Liberian corporation is the plaintiff in this action, *Medoil* is not factually analogous to *Mitsubishi*, where the plaintiff was a United States corporation.<sup>208</sup> The dictum in *Mitsubishi* is unclear on whether the possibility of nonenforcement is only open to United States citizens, residents, or both.<sup>209</sup> It may be the case that the Supreme Court would not protect Medoil from the forum-selection and choice-of-law clauses because Medoil is a Liberian corporation, with its only substantial connection to the United States being its office in Connecticut. Allowing Medoil to seek refuge in an expanded reading of the *Mitsubishi* dictum may not comport with the policy justifications for not enforcing a forum-selection and choice-of-law clause in an international securities agreement. By incorporating in Liberia, Medoil sought to avail itself of the benefits of the local West African shipping markets and to escape from the more restrictive laws of the United States. In effect, Medoil would be given the benefit of both worlds if it were allowed to challenge enforceability under these circumstances. Indeed, Medoil would be able to avail itself of the benefits of the Liberian incorporation, and to escape the grasp of United States corporate laws, while at

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204. Justice Powell took no part in the decision.

205. 473 U.S. at 640.

206. See *Plaintiff's Memorandum*, *supra* note 132, at 27; *Plaintiff's Exhibits*, *supra* note 134, exhibit 21, at 3.

207. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1457 (S.D.N.Y. 1990).

208. 473 U.S. at 617.

209. *Id.* at 637, n.19.

the same time receiving the benefits of the policies behind the antifraud provisions of the Exchange Act. Whatever the outcome, some of the remaining uncertainty concerning the forum-selection clause enforceability doctrine could have been eliminated had the district court discussed 1) the effect of the dictum in *Mitsubishi* on the *Medoil* dispute, and 2) whether the doctrine should be extended to foreign corporations with offices in the United States, as well as to United States citizens.

*B. The Extraterritorial Application of the Securities Exchange Act of 1934*

Since the *Medoil* dispute was between a Liberian plaintiff and Swiss defendant, and the alleged fraudulent conduct occurred in Switzerland, deciding the case on the merits would involve the extraterritorial application of the Exchange Act.<sup>210</sup> The extraterritorial application of these laws involve numerous policy issues including comity, bases of jurisdiction, and conflict-of-law analysis.<sup>211</sup> In examining such issues, courts often rely on the Restatement (Third) The Foreign Relations Law of the United States (Restatement (Third)).<sup>212</sup> The drafters of the Restatement (Third) were guided by policy concerns similar to those raised by the forum-selection clause enforceability doctrine when they developed their rules for the extraterritorial application of United States law. These concerns include international comity, protection of the United States territorial sovereignty, and lessening concurrent jurisdictional problems.<sup>213</sup> In resolving the forum-selection clause enforceability issue in *Medoil*, the district court should have discussed the Restatement (Third) and the policy issues related to the jurisdiction to prescribe the Exchange Act in order to further define the scope of the forum-selection clause enforceability doctrine.

With respect to *Medoil's* claims under the Exchange Act, the district court should have pointed out that, under the Re-

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210. RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403, 416 (1987). See also *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). *Medoil's* pendent state claims are not addressed by this Comment. Also, *Medoil's* claims under the Racketeer Influenced and Corrupt Organizations Act would be treated the same as its claims under the Securities Exchange Act of 1934.

211. See *Timberlane*, 549 F.2d at 615.

212. See *id.* at 608-12.

213. RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. a, § 416 cmt. a (1987).

statement (Third), the Exchange Act would probably not have been applied to the dispute.<sup>214</sup> In deciding this issue, a court may turn to section 416 of the Restatement (Third), entitled Jurisdiction to Regulate Activities Related to Securities. Section 416(1) contemplates securities activities occurring totally or predominantly within the United States and is therefore not applicable to *Medoil*.<sup>215</sup> However, section 416(2) deals with activities that occur outside the United States, and may be applied by United States courts to disputes similar to *Medoil*. Section 416(2) states:

Whether the United States may exercise jurisdiction to prescribe with respect to transactions or conduct other than those addressed in Subsection (1) depends on whether such exercise of jurisdiction is reasonable in light of § 403, in particular . . . (c) whether the party sought to be subjected to the jurisdiction of the United States is a United States national or resident, or *the persons to be protected are United States nationals or residents*.<sup>216</sup>

Section 403(2) states: "[w]hether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including . . .," and then lists eight factors which should be evaluated by the court.<sup>217</sup> The factors include: the link between the activity and the regulating state; the connections between the regulating state and the person responsible for the activity; the extent to which another state may have an interest in regulating the activity; the likelihood of conflict with regulation of another state; and the importance of regulating the activity to the regulating state.<sup>218</sup> By discussing the impact of the Restatement (Third), the district court could have helped to refine and clarify the forum-selection clause enforceability doctrine.

In deciding the issue of the extraterritorial application of the Exchange Act, the district court would most likely have concluded that the dispute should not be governed by the Act.<sup>219</sup> Section 416(2)(c) centers on the links of nationality and resi-

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214. *See id.* § 416.

215. *Id.* § 416(1).

216. *Id.* § 416(2).

217. *Id.* § 403(2).

218. *Id.*

219. *See id.* §§ 416(2)(b), 403(2).

dence of the parties, in line with section 403(2)(b).<sup>220</sup> Since the alleged fraudulent activity occurred entirely within Switzerland, there were no territorial links with the United States. Also, the conduct was committed by a Swiss national against a Liberian corporation.<sup>221</sup> Therefore, the application of the Exchange Act would be unreasonable in light of section 416(2)(c) and section 403(2).

The argument against enforcing the Exchange Act in the Medoil dispute is further buttressed by the Reporters' note following section 416(2)(b).<sup>222</sup> The Reporters' wrote:

Whether exercise of regulatory jurisdiction by the United States is justified in order to protect residents of the United States against actions taken outside the country depends on the circumstances. For instance, a resident of the United States who deliberately traveled to Canada to trade in Canadian securities . . . should not be entitled to the protection of the United States law in an action against his Canadian vendor/lender.<sup>223</sup>

Since the fact pattern in *Medoil* is similar to the example given in the Reporters' note to section 416, it cannot be denied that Reporters' intended not to apply the Exchange Act to situations such as this. In fact, the Reporters' comment is even more restrictive because it mentions a resident of the United States who is an individual, not a corporation as is the case with Medoil.

Although the district court reached the correct decision in dismissing the suit due to the forum-selection clause, a discussion of the extraterritorial application of the Exchange Act would have served to better define the scope of the forum-selection clause enforceability doctrine. By discussing such issues the federal courts would send a clear message concerning the policy reasons for refusing to enforce such clauses. With this message, the international business community will be better able to draft more certain contracts and to avoid potential conflicting jurisdictional problems.

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220. *Id.* 416(2)(c) reporter's note 2.

221. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1457-58 (S.D.N.Y. 1990).

222. RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 reporter's note 2.

223. *Id.* (citing *Kook v. Crang*, 182 F. Supp. 388 (S.D.N.Y. 1960)).

## V. RECOMMENDATIONS

If the forum-selection clause enforceability doctrine is to continue to benefit the international business community and the courts, the doctrine must necessarily be more clearly defined. A clearly defined doctrine will allow both the international business community and the courts to take full advantage of its benefits. The necessity for establishing a clear standard against which to measure forum-selection clause litigation requires the lower courts to make more probing inquiries into the interests of each forum, the likelihood of just adjudication in the contractual forum, and the overriding policy concerns of the United States. The needs of certainty, stability, and the encouragement of international trade are compelling, but they should not outshadow the equally compelling public policy concerns of the United States. Allowing the prima facie validity of these clauses to reign supreme may have the reverse effect than that imagined in *The Bremen*.

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